United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-7012

- -

WILLIAM McQUILLAN,

Plaintiff-Appellant,

-against-

"ITALIA"-SOCIETA PER AZIONE DI NAVIGAZIONE,

Defendant-Appellee.

- -

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P/S

APPEAL FROM ORDER AND JUDGMENT

OF THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR PLAINTIFF-APPELLANT

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WILLIAM McQUILLAN,

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-against-

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Defendant-Appellee.

- -

1. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

The issues presented for review are as follows:

A. The face of the ticket issued to McQuillan by "Italia" for a Caribbean cruise contained all the essential terms of the contract of passage between the parties and did not effectively incorporate by reference any of the other terms and conditions printed elsewhere in the passage booklet by reason of the fact that the rubric or notice attempting incorporation was printed in such size, manner and format as failed to give adequate and reasonable notice and warning to McQuillan of purported incorporation. "Italia" has failed to do all that it reasonably could do to warn McQuillan of attempted incorporation by reference.

B. The passage contract between McQuillan and "Italia" became firm and final at the time McQuillan paid his passage money and it's terms appear on the face of the ticket and not elsewhere. Any after-delivered passage booklet could not bind McQuillan without his consent.

C. McQuillan has raised genuine triable issues of fact concerning the effectiveness of the rubric or notice printed on the face of

the ticket which issues should be decided by the trier of the facts and should not be disposed of by trial by affidavit on a motion for summary judgment. No party having a scintilla of merit should have his cause disposed of without his day in Court. The purpose of a motion for summary judgment is to determine if there are issues to be tried and if such issues exist, summary judgment must be denied.

D. The time limitation clause in which to bring suit contained in the passage booklet is not binding upon McQuillan as it was not contained on the face of the ticket and incorporation by reference has failed.

E. The ticket face issued to McQuillan has been litigated in two different jurisdictions and rejected as failing to incorporate by reference any other terms and conditions contained elsewhere in the passage booklet. It has been rejected in Silvestri-vs-"Italia-etc., 388 F2,11 (2CCA)1968, and in Owens-vs-"Italia"-etc. 334 N.Y.Supp.2nd 789,affirmed, Per Curiam, 347 N.Y.Supp.2nd 431,(1973).

F. "Italia" is estopped from raising the issue of a time limitation clause because it picked up McQuillan's ticket upon embarkation, leaving him and his counsel completely unaware of the existence of such purported clause. "Italia" thereafter carried on a protracted correspondence with McQuillan and his counsel in negotions and never revealed the existence of such clause or that it intended to rely upon it as a defense.

3. STATEMENT OF THE CASE.

Appeal by Plaintiff-Appellant William McQuillan from an order of Hon. Henry F. Werker, D.J. Southern District of New York, and the judgment entered thereon granting summary judgment to defendant and the judgment entered thereon, and from the order of the same Justice denying McQuillan's motion for re-argument.

This is an action in negligence brought by McQuillan for injuries sustained when he sat down on a deck chair aboard Defendant-Appellee's vessel S.S.Michelangelo which broke and caused him to fall to the deck and suffer personal injuries.

McQuillan, a New York resident and domiciliary, purchased his ticket in New York City from Liberty Travel Agency, "Italia"'s duly authorized agent. The voyage began and ended in New York City. McQuillan sustained his injuries while on the high seas which confined him to his cabin, prevented him from going ashore at various ports of call and made it necessary for his wife to remain aboard to minister and care for him, thus depriving both of them of the benefits and pleasures of the vacation cruise. The injury occured February 7th, 1973.

On returning to New York McQuillan notified "Italia" of his injuries (which had already been treated on board and entires made in the ship's medical log) and engaged in correspondence with them. Thereafter counsel was engaged and further correspondence between "Italia" and counsel followed. At no time did "Italia" ever mention that a time limitation clause existed in it's passage booklet or that it would rely upon any such purported time limitation.

On receipt of "Italia's letter of April 1, 1974, raising for the first time reliance upon a purported time limitation clause in the ticket, suit was immediately begun in New York County Supreme Court. "Italia" thereafter removed to the United States District Court, Southern District of New York on the grounds of diversity.

"Italia" moved for summary judgment dismissing the complaint citing the purported time limitation clause. Thirteen months and twenty nine days have elapsed between the date of injury and the commencement of suit.

The motion for summary judgment was granted by Hon. Henry F. Werker, D.J. by memorandum and order dated November 19, 1974, and judgment dismissing the complaint was entered by the Clerk of the Court on November 21, 1974. McQuillan then moved for re-argument and this motion was denied by the same Judge by memorandum order dated December 18, 1974.

McQuillan had appealed from the order and judgment dismissing the complaint by notice of appeal on December 18th, 1974, and by amended notice of appeal from the memorandum and order denying the motion for re-argument as well as the original memorandum, order and judgment, on December 26th, 1974.

THE FACTS.

McQuillan bought tickets for himself and wife from 'Liberty", "Italia's" authorized travel agent, in New York City, for a Caribbean cruise aboard "Italia's" vessel SS MichelAngelo. They embarked in and returned to New York City. McQuillan is a New York resident and domiciliary. (App. p.17). At the time of purchase no ticket was shown or given to McQuillan, nor did 'Liberty' discuss with him any matters about terms and conditions of the voyage. (App.p.18).

Upon embarkation in New York, "Italia" picked up McQui lan's tickets. While on the high seas McQuillan sat down on a deck chair which broke under him causing severe injuries when he fell to the deck. (App.p.17). McQuillan had received his tickets just a short time before sailing. (App. p.21.)

McQuillan was treated aboard ship by the ship's surgeon,(Rec/App. Doc. No.13, Ex.M-1) and confined to his bed so that he was unable to make any visits ashore and his wife compelled to remain with him to minister to his injuries.

Upon his return to New York McQuillan immediately wrote a claim letter to "Italia". (Rec/App. Doc.13, Ex.D.). Thereafter lengthy correspondence ensued between "Italia" and McQuillan's counsel, in which negotiations continued but in which "Italia" never raised the issue of a time limitation in the passage contract. (App. pp.13,14; Rec/App. Doc.13, Ex.J,K-1,K-2,L,M-1,M-2.)

"Italia" for the first time raised the issue of a time limitation in its letter of April 1, 1974, (Rec/App.Doc.13,Ex.O). Plaintiff immediately instituted suit in New York County Supreme Court by the service of a summons. (App. p.11). "Italia" then moved to remove to this Court on the grounds of diversity. (App. p.3, Docket,5/28/74).

POINT I.

THE RUBRIC OR NOTICE ON THE FACE OF THE TICKET COMPLETELY FAILED TO INCORPORATE BY REFERENCE ANY OTHER TERMS OR CONDITIONS CONTAINED ELSEWHERE IS THE PASSAGE BOOKLET BY REASON OF THE FACT THAT IT WAS PRINTED IN SUCH MINISCULE SIZE MANNER AND FORMAT THAT IT FAILED TO WARN AND GIVE McQUILLAN ADEQUATE NOTICE OF PURPORTED INCORPORATION.

The Courts have consistently held that in order to effectively incorporate by reference into the ticket contract terms and conditions printed elsewhere than on the face of the ticket the rubric or notice attempting incorporation must be of such size, manner and format as to constitute all that the steamship line could reasonably do to warn the passenger of incorporation by reference.

"The Majestic", 166 U.S.375 (1897),is the leading case in support of this doctrine. Therein,Fuller, Ch.J. writing for the unanimous Court, allowed the passengers to recover without any time limitation , holding that the time limitations printed on the ticket:

> "were not included in the contract proper in terms or by reference." (166 U.S.375,385)

citing as supporting authority Richardson, Spence & Co. v.Rowntree, (1894) A.C.217; Henderson v.Stevenson, L.R.2 Sc.& Div.App.470(1875).

In Silvestri v."Italia"Societa per Azione di Navigazione, 388 Fed.2, 11(2CCA)1968, this very Court had occasion to adjudicate the identical ticket issued to McQuillan and declare that it utterly failed to incorporate by reference any terms or conditions printed elsewhere than on the ticket face.

"Italia" herein and "Italia" in 'Silvestri' are one and the same party. The face of the 'Silvestri' ticket (App. p.23) and the face of the McQillan ticket (App.p.22) are submitted for comparison. Their size, type, format, arrangement of boxes, size of print and other points of comparison are discussed at great length and detail in the affidavit of Harold I.Gold (Rec./App. Doc.13, Plff.'s affid/oppos.) Close examination reveals that the faces of both tickets are overwhelmingly identical, and if anything at all the printing of the McQuillan ticket is even smaller than the 'Silvestri'ticket, as Werker, C.J.in his memorandum below had occasion to state:

> "Inexplicably, the printing in the upper left hand corner is in even smaller type than that in Silvestri." (italics in original) (App.p.36)

The 'Silvestri' ticket was litigated, analyzed and rejected by this Court in "Silvestri",supra, where Friendly, C.J. held:

> " In an effort to meet the rule in 'The Majestic' which the Supreme Court has had no further occasion to elicidate, steamship companies have used various expedients to effect inclusion in the contract of the all too numerous conditions they appear to consider essential. Here the "box" bore in the upper right hand corner the words:
>
> biglietto di passagio
> passage contract
>
> followed by an identifying number, and in the lower right hand corner the validating stamp of the issuing travel agent. Almost all of the captions in the "box" were in capital or bold face letters, the major exception being the following statements, which appeared in the upper left hand corner of the ticket in ordinary lower case one eighteenth inch type:

" Il presente biglietto di passagio e soggetto alle condizione stampate sulla copertina e sui fogli n° 1 e 2.

Subject to the conditions printed on the cover of this ticket which form a part of this contract.

The inconspicuosness of these staements was increased by the fact that they were squeezed immediately below a caption in bold face and to the left of one in capital letters. The two "leaves" which are an integral part of the coupon retained by the passenger were headed "TERMS AND CONDITIONS" in bold face. Then followed 35 numbered paragraphs in very small print. At the end were spaces for signature by or for the passenger, but neither Silvestri nor any representative signed.

Judicial efforts to determine what suffices to meet the rule of The Majestic have produced distinctions of considerable nicety. The early decisions of this Court ruled against incorporation. La Bourgogne, 144 F.781 (2 Cir.1906); The Minnetonka, 146 F. 509 (2 Cir.1906); Smith v.North German Lloyd S.S. Co.. 151 F.222 (2Cir.1907).[3] A contrary line of authority finds its main doctrinal source in Murray v. Cunard Steamship Co., 235 N.Y.162, 139 N.E.226, A.L.R.1371 (1923)."

The Court went on at great length to discuss the detailed facts and ticket formats employed in the "Maibrunn", "Baer","Bellochia", "Kungsholm" and "Baron" cases, all cited and discusssed infra, pointing out where notice was sufficiently given the passenger and where it also failed to meet the test of sufficient notice and incorporation. The Court continued:

" However, the thread that runs implicitly through the cases sustaining incorporation is that the steamship line has done all that it could reasonably do to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights.

"(3)How far the legend in the Italian Line's ticket alleged to effect incorporation fell below what could reasonably have been expected is sufficiently shown by contrasting it with the forms used by other steamship companies in the cases we have discussed. Nothing whatever was done to impress the importance of the terms and conditions upon the passenger. Indeed, although no point has been made of this, the English version is probably inadequate even from a literal standpoint since it refers only to"the conditions printed on the cover" whereas Article 30 seems rather to have been on one of the sheets forming part of the passenger's coupon. While we would not insist on any particular rubric, seventy years of experience under 'The Majestic'doctrine should have enabled the draftman of the ticket to produce a warning significantly more eye catching than this." (italics supplied).

The very same ticket face was again adjudicated in Owens v. Italia Societa Per Azione Di Navigazione, 334 N.Y.Supp.2nd 789 (1972), and affirmed unanimously in a Per Curiam decision by the Appellate Term, First Department, 347 N.Y.Supp.2nd,431 (July 27, 1973).

In discussing the "Owens" ticket, in the New York City Civil Court, Shainswit, J. held:

"(5) Defendant urges that the Court is powerless to afford plaintiff any relief because of the existence of so-called"terms and conditions embedded in the ticket booklet furnished plaintiff. Defendant's position is graceless and without merit on the facts and on the law. It ignores the following cardinal features:

At the threshold, turning to the actual passenger ticket even the Court itself found difficulty in ascertaining the existence of any reference to the "terms and conditions". At the risk of considerable eyestrain, the Court finally detected that, under a sentence in microscopic Italian script, there is a parallel, virtually unreadable collation of English words, which appear to state: "Subject to the

"conditions printed on the cover of this ticket which form part of this contract"

This reference is so tucked away, so camouflaged by the surrounding Italian text, and so miniscule in presentation that it is literally a trap for the unwary. There is no legend, in contrast to the legends utilized on every other segment of the ticket, calling attention to its existence. It can only be located, after the most diligent search, if one knows beforehand that it actually exists. (italics supplied)

* *

In a nutshell, defendant urges that the Court is bound (a) by the covert statement on the face of the ticket, and (b) by the virtually undecipherable "terms and conditions" that that statement springs on the plaintiff.

(6) Justice is not that easily handcuffed. Patently, the contract of passage is a contract of adhesion. And vis-a-vis such a contract, the law frowns upon any effort by a carrier such as defendant, to expose a passenger to risks and detriments without fair notice or fair play.

This is not the first time defendant has been judicially called to task because of the format of its ticket. One would have expected that it would have mended its ways after the firm rebuke by (now Chief) Judge Friendly in Silvestri v. Italia Societa Per Azione, 388 F.2nd 11, (C.A.2d) 1968. The ticket involved there was the precise counterpart of the one in the case at bar. In condemning the Italian Line, and the contention that its model of unreadability could be palmed off as a valid incorporation by reference, Judge Friendly emphasized, after marshalling the solid body of precedents (388 F.2d at 17-18): "(italics added).

and Judge Shainswit then went on to quote the previous citations quoted from 'Silvestri", supra, and concluded with:

" I make the same finding as the 'Silvestri 'Court . The Italian line has done virtually nothing at all to warn the passenger of the "terms and conditions" that made his rights under the contract of passage an illusion." (italics added).

Upon unanimous affirmance by the Appellate Term in a per Curiam decision, supra, this decision became the 'Lex Loci" and should have bound the Court below as firmly as the 'Silvestri 'supra decision became binding in the Federal jurisdiction.

In The Kungsholm, 86 Fed.2, 703 (2CCA,1936)

this Court again rejected incorporation by reference of any time limitation clause by holding"

> "* * * So the question is , what was the contract of transportation ? and this turns on the form of the ticket, as we have held in many recent cases, all of which go back to the doctrine of The Majestic, 166 U.S.375, 17 S.Ct.597, 41 L.Ed.1039. See Baer v. North German Lloyd (CCA)72 Fed.2,286; Maibrunn v. Hamburg-American S.S.Co. (CCA) 77 Fed.2,304; Bellochio v.Italia Flotte,etc.Line,(CCA) 84 Fed.2, 975 These caseshold that stipulations affecting affecting the carrier's liability must either be brought to the knowledge of the passenger or must be incorporated, at least by reference, into the very body of the contract, and that not all that is printed on the face of the ticket is necessarily within the body of the transportation contract. Concededly it is a very formal doctrine, but it is thoroughly established in this circuit." (italics added).

After describing the face of the ticket the Court continued:

> "* * * In the light of the foregoing authorities we must say that this was the contract of transportation unless the passenger had knowledge of the printed condition which the carrier relies upon. It is true that the printed matter to the right of this 'box' is headed 'Cruise Contract' and states in large type, 'the following stipulations are a part of this contract which must be signed by the passenger on the overpage immediately upon its receipt'. But there is nothing above the carrier's signature to incorporate expressly or by reference any of these stipulations; and as already stated there is nothing to show Mr. Moran or his agent had knowledge of of them before he embarked. In the Maibrunn Case also there was a notice on the face of the ticket calling the attention of the passengers to conditionsprinted on the back. Formal and technical as is the rule we can find no rational basis for taking this ease out of it." (italics supplied).

In "Owens" supra, the Court cited a long line of Federal and New York cases where air line carriers resort to exceedingly fine print in an effort to limit liability under the Warsaw Convention has been firmly rejected. (p.796).

In Maibrunn v. Hamburg-American S.S.Co. 77 Fed.2,304 the Court reviewed the leading cases on the subject, rejected the implications of an alleged notice and reversed in favor of the plaintiff, holding:

> "* * * On the face of the ticket, but at one side of printing and writing which formed the contract proper, so far as there was one, was a legend reading as follows: "Notice. The attention of passengers is especially directed to the terms and provisions of this contract printed on the reverse side which must which must be signed by the passenger and the agent". * * *The plaintiff never personally signed the ticket, and though it was signed by the 'travel bureau' from which he bought it, this was certainly done, not as his agent, but as the defendant's. * * * * * * *
>
> Thus the question is whether the legend charged the plaintiff with what was on the back merely because he accepted the ticket, though without knowledge, for he had not examined it. In Baer v.North German Lloyd, 69 Fed.2, 88(CCA 2) the form of the notice was so different that it does not help us to a conclusion here. But it seems to us that The Majestic 166 U.S.375, 17S.Ct.597, rules and in the plaintiff's favor. * * * Yet, as we understand it just this distinction does exist; only the contract proper charges the passenger, and the contract is taken as those words which the carrier authenticates by its own signature; notices and legends alongside are no part of it. * * * ; we hold that because not incorporated directly or be reference into the contract, they were no part of it." (italics supplied)

The Court is asked to note that this case holds that the face of the ticket and the 'box' form the contract proper and that only the contract proper charges the passenger. This point will again be discussed infra in view of the holdings in "Silvestri" and "Owens" supra, that the alleged notices in the 'box' on the face of the ticket were so miniscule and inadequate as to fail to give proper notice to the passenger.

In Bellachio v.Italia Flotte,etc., 84 Fed.2,975, this Circuit upheld this doctrine holding the purported time limitation was not a part of the ticket contract:

> "* * * Maibrunn v. Hamburg-American SS. CO. 77 Fed.2,304 (CCA 2)- a stronger case for the ship holds that it is not. On the face of the ticket in that case, though not forming a part of the contract proper, there was a notice calling the attention of the passenger to the provisions printed on the back; yeteven that did not take it out of the doctrine of The Majestic, * * *" (italics supplied)

In Baer v. North German LLoyd, (CCA) 72 Fed.2, 88, reversed in favor of plaintiff holding that purported conditions of the transportation contract were merely notices, stating:

> " The effect of these headings over the column in which the conditions were printed was to notify the passenger that the contract under which the transportation was to be furnished by the defendant was subject to the conditions there set forth. These conditions were not referred to at all in the ticket proper which was duly signed in behalf of the defendant and which was the transportation contract binding upon the parties. Since they were not in any way incorporated in the body of the contract, they were merely notices. The Majestic, 166 U.S.375; Where such conditions do not appear in form or by reference in the contract itslef and are consequently no more than notices, they cannot avail the defendant unless distinctly brought to the knowledge of the passenger." (italics supplied).

In "Baer" supra, defendant relied heavily upon Murray v. Cunard S.S.Co. 235 N.Y.162, to show the contrary, but the Court rejected this contention, holding:

> " * * * We do not so read that case".(p.90)

In Furr v. Societa Italia, 162 Fed.Supp.645 further recognition of the rule was accorded by Bicks,D.J.holding:

> " An examination of the case reveals that in those where the disputed provision was clearly in large type; and in an obvious place referred to in the ticket the passenger was generally held to its terms; but where the type was small and the attention of the passenger was not, by virtue of the physical format of the ticket, likely to be focused on the disputed provisions, the converse is true and the conditions were held not to be incorporated." (italics supplied.)

The foregoing cases and those cited infra hold that the "box" on the face of the ticket constitutes the body of the transportation contract and that incorporation by reference of terms and conditions outside the box can only be accomplished by rubrics or notices sufficient to impress their importance upon the passenger, supra "Silvestri" and "Owens".

Cases holding the opposite point of view in following the doctrine of Murray v. Cunard, supra, have all been decided upon their own peculiar circumstances and facts and must be distinguished by the very form of ticket face employed. Recognizing this distinction and after describing in detail the form and type printing of the face of the ticket the eminent Cardozo,J. held:

> "Here the condition is wrought into the tissue, the two inseperably integrated."

In Baron v. Compagnie Generale Transatlantique, 108 Fed.2,21(CCA 2)the notice began at the top of the ticket page and after spaces for the details of the voyage there were printed in prominent red type:

> "Passengers should read the terms of the contract of

"carriage stated below and overpage, their particular attention being called to the limitations of liability therein contained.' This sentence was followed by the heading'Terms of Contract-Read Before Accepting.' The carrier's agreement to carry the passenger in consideratio of the fare was then set forth, followed immediately by provisions in numbered paragraphs. The numbered paragraphs began near the foot of the page and continued over on the back."

The Court held that on these facts the transportation contract was binding on passenger.

In Foster v.Cunard-White Star S.S. Line, 121 Fed.2, 12, this Court followed Baron v. Compagnie.etc.,supra, quoting:

"For we find a direct reference in the box on the face of the ticket to the terms andconditions of the contract, <u>these were carried on the ticket's face and back into the box itself, so that the final condition is actually found there</u>, and the signature of the carrier appears immediately thereafter. Thus the limitation is directly made a part of the contract of carriage." (italics supplied).

The Leviathan, 72 Fed.2, 286 (2CCA-1934) is distinguished as the passenger's attention was forcibly directed to a baggage limitation of liability on the face of the ticket where the Court stated:

"It was printed in english and signed on its face by the agent of the defendant. Above his signature was set forth a short statement of the terms of the contract, which included this sentence:

" The luggage carried under this engagement, whether in excess of 200 lbs or 20 cubic feet, or not, shall be deemed to be of a value not exceeding 20 pounds unless the value in excess of that sum be declared and paid for."

The words "See Back" were also printed on the face of the ticket, * * * * "

Plaintiff failed to take advantage of the opportunity to declare and pay for excess valuation of baggage and was held limited to the clause printed on the face of ticket.

Reicman v. Compagnie Generale Transatlantique, 290 N.Y.344,349, reveals that the ticket contained no less than three distinct legends on the face of the ticket calling the passenger's attention to the terms of the contract and limitations of liability and the Court held this binding upon plaintiff, under the doctrine of Murray v. Cunard, supra.

In Siegelman v. Cunard-White Star Ltd. 221 Fed.2, 189 (2CCA-1955) the form of the ticket again the Court again followed the "Murray" doctrine,supra, by reason of the form of ticket printing employed, describing it as:

> "* * * It was a large sheet of light green paper, about 13 inches long and 11 inches wide, on the back werecertain notices to passengers, relating to baggage,time of collection of ticket, location of companie's piers and offices, etc.. On the front was printed in black Cunard's promise to provide specified transportation, in this case from New York to Cherbourg; subject to certain exceptions, and to 22 'terms and conditions, also printed in black. Printed in red in heavier type was a notice directing the attention of passengers to these 'terms and conditions.' Also printed in red and in capital letters was a statement that 'it is mutually agreed that this contract ticket is issued by the Company and accepted by the passenger on the following terms and conditions.' "(Italics added).

A photocopy of the above ticket used and described above is annexed (App.p. 25) and it can be readily ascertained that the very form of a ticket on a single large page with adequate warnings in red ink was a sufficient passenger contract ticket.

A case frequently cited as distinguishing "Silvestri" supra, is Lipton v. National Hellenic American S.S.Co. 294 Fed.Supp.308 (EDNY 1968). But the Court is cautioned that this is an Eastern District of New York decision that was dismissed for failure to prosecute an appeal and runs counter to the great weight of prevailing opinion in this Circuit. Annexed in the Appendix at page 28 to 31, is a photocopy of the "Lipton" ticket. Comparison of the ticket size, style, print size, arrangement, vividness of notice and general format of this ticket with the "McQuillan", "Owens" and "Silvestri" tickets reveal major differences in format and notice provisions, if arguendo, the face of the ticket purports to be a passage contract instead of a passage ticket.

An item by item comparison of the "Lipton" ticket is contained in the affidavit of Harold I. Gold, 9/27/1974, (Rec/App. Doc. No.13, Ex.P-1,2.)

Geller v.Holland-American Line,201 Fed. Supp.508 (SDNY-1961), affd.298 Fed.2,618 (2CCA-1961) follows the doctrine of the "Murray" supra cases. Here again it is determined that the rubric or notice of incorporation is wrought into the very tissue of the contract. The first page of a two page contract contains the following legends:

> "Cruise Passage Contract."
>
> "Subject to the TERMS OF PASSAGE CONTRACT printed on the face hereof and continued overleaf, which terms are made a part of this contract."
>
> "NOTICE The attention of passengers is especially directed to the Terms of Passage Contract, which please read carefully."

"TERMS OF PASSAGE CONTRACT."

"TERMS OF PASSAGE CONTRACT CONTINUED OVERLEAF"

These legends are carried in no less than five different places on the first page of a two page contract. The "Geller" ticket is annexed (App.pp.26) and is minutely described in the affidavit of Harold I. Gold, 9/27/1974. (Rec/App. Doc.No.13, Ex.H,I).

McCaffrey v. Cunard S.S.Co. 139 Fed.Supp.472, (SDNY-1955) was decided under British Law and yet summary judgment was denied as stated in the opinion:

> "* * * the question of whether the carrier did what was reasonably sufficient to give the plaintiff notice of the conditions of the contract.
> The issue was thus framed in Parker v.South Eastern Railway Co. C.A.36 L.T.R.540,543 (1877); and approved by the Hosue of Lords in Richardson, Spence & Co. v. Rowntree (1894) A.C.217,220. It has been accepted as a statement of British law ever since.
>
> (3) * * * the question of the sufficiency of the of the conditions is one left for the trier of the facts.* * * This has been true even in some cases where the conditions were on the face of the ticket. See Williamson v. North of Scotland and Orkney and Shetland Steam Navigation Co. 1916, S.C.554,562, where the verdict for plaintiff was affirmed because of small size of type, and Hood v. Anchor Line (1918) A.C.837, 844,H.L., where the verdict for defendant was affirmed but the issue recognized as one of fact
>
> * * * * * * * * * * * * * * * * * * *
>
> (5) Upon the facts of the present case,the issue must be left for the jury. * * * * (italics added.) "

In The Cretic, 224 Fed.216, the terms of the passage contract were wrought into the tissue of the passage ticket, reading:

> " This ticket is good for first class passage of 3 adults, 1 child,---servants,---infants by Boat S.S. Cretic to sail from Boston for Genoa on June 28, 1913, unless prevented by some unforeseen circumstance, upon the following conditions which are agreed upon between the Company and each passenger: viz, at 4 P.M.
> * * * * * * * * * * * * * * * * * *
> 4. Limitation Clause.* * * * * * * * * * * * * * * * *"

and began on the first page at the very start of the ticket.

In Rogers v. Furness, Withy Line, 103 Fed. Supp.314, the terms of the contract began on page one and occuppied more than one third of the page commencing with the words " It is mutually agreed" and was signed by the agent and the passenger's friend.

In Stapp v. Italia, etc. 181 Fed.Supp.581, Sugarman, D.J. denied summary judgment holding that the entire contract appeared on the first page of the ticket in the 'box' and a time limitation was no bar to the action, stating:

> " Therefore unless on the trial the defendant can prove that plaintiff had actual knowledge of the printed matters on which defendant now relies, the entire contract of transportation appears on the first page of the ticket in the"box" above defendant's signature.
>
> The motion is denied.(1)"

Horvath v. Cunard S.S.Co. 103 Fed. Supp.356, is another case that follows the "Murray"doctrine, supra, as Galston, D.J. aptly pointed to the distinguishing features of the ticket:

> "The above condition appears on the face of the ticket. Also stated on the face of the ticket in capital letters in red ink is the following: 'And it is mutually agreed that this contract ticket is issued by the Company and accepted by the Passenger on the following Terms and Conditions- -:
>
> The terms and conditions referred to are prefaced by a notice in red ink, near the top of the ticket stating as follows: 'Notice. The attention of passengers is specially directed to the Terms and Conditions of this Contract." (Italics added).

The citation of cases in point following The Majestic,supra, doctrine and its progeny summarizes the rule that the face of the ticket contains the passage contract between passenger and carrier and that notices alongside or at any other place constitute mere notices not binding on the passenger unless the carrier can specifically prove that the passenger had notice or knowledge of them and that the carrier had done all that he reasonably could do to bring them to the passenger's attention. Legends or notices contained within the'box' of the ticket must be of such size, shape, format and legibility as to bring them forcibly to the passenger's attention and be all that the carrier could do reasonably to accomplish this end.

It is the ticket face and 'box' which constitutes the focal and starting point of the contract and this Circuit Court of Appeals and the Appellate Term, First

Department, in "Silvestri" and "Owens" supra, have both emphatically litigated and rejected the present ticket face and format of "Italia's"'McQuillan' ticket which is identical to those cited above.

It is obvious that the Court below erred comp[illegible]ly in focusing his attention on the cover of 'McQuillan's ticket and was distracted from the necessity of examining the ticket face for the essence of the contract of transportation.

As the Courts have repeatedly rejected conditions printed 'on the back','onthe overpage' and other places the cover of the ticket stands in the same category and statements printed there must likewise be rejected.

Indeed the Court below was well aware of the inadequacy of the legend in the upper left hand corner of the ticket face 'box' when he stated in his memorandum:

> " The"ticket" portion of the passage contract in the case at bar is substantially the same as that in Silvestri. Inexplicably, the printing in the upper left hand corner is in even smaller type than that in Silvestri" (App.p.36)

The Court below erred further in giving great weight and reliance to the ticket in"Lipton",supra, failing to distinguish that "Lipton" was an unappealed Eastern District of New York case that ran contra to the great weight of authority in this jurisdiction. The Court below did recognize that the face of the "Lipton" cover"was phrased in stronger terms" (App.p.37) but in this writer's humble opinion even that could not and should not take it out of and overthrow the doctrine of The Majestic, supra.

The Court below erred in placing reliance upon Ager v. D/S A/S Den Norske-Afrika-OG Australielinie Wilhelmsens Dampskibsak-Tiesælskab, 336 F.Supp.1187 (SDNY 1972). In "Ager" supra, Gurfein, D.J.specifically recognized that"The ticket here was not like the ticket in Silvestri v. Italia,etc." (p.1188) but compared it to the "Lipton" ticket, supra, which is, as before stated, contra to the rule in this Circuit.

Incorporation by reference was again rejected in Weinberger v. Compagnie Generale Transatlantique, 146 Fed.516, the Court holding:

> " These clauses although entitled 'Conditions of Passage'do not appear to be anything more than notices They are printed in connection with the ticket but not made a part thereof and are of no greater force than if printed on the back of the ticket."

The face of the ticket cannot be adjudged to be a valid transportation contract binding upon the passenger as nowheres does there appear the signature of McQuillan or the signature of the carrier or its duly authorized officer. The cases are consistent that in order for the contract to be binding the signature of the passenger and the carrier must appear at the end thereof.

In The Kungsholm, supra, the passenger signed the ticket the day after he boarded the vessel. The Court held:

> "Necessarily the contract of transportation is complete at the time the passenger embarks, and it could not be changed by the subsequent affixing of Mr. Moran's signature since that would be without consideration."

In Maibrunn v. Hamburg-American S.S. supra, the plaintiff never personally signed the ticket although the "travel agent" signed on behalf of the carrier. The Court re-

jected incorporation and held the time limitation clause not binding on plaintiff.

In Azrak v.Panama Canal Co. 117 Fed. Supp. 334, (SDNY 1953) Sugarman, D.J. held:

" (1)Defendant relies on cases which hold that a passenger is bound by the terms of the contract of passage embodied in the transportation ticket regardless of whether it was read or signed by him.(1). However, these cases leave unaffected the rule in this Circuit that the terms of a contract such as here presented are not binding on the purported parties unless the person sought to be bound has at least constructive or imputed knowledge of the contractual provisions and accepts them expressly or impliedly.(2)."(italics added)
Citing-1. Murray v. Cunard, supra,
2. The Kungsholm, supra.

POINT II

SUMMARY JUDGMENT SHOULD BE DENIED WHERE A BONA FIDE MATERIAL ISSUE OF FACT EXISTS: WHERE THE SLIGHTEST DOUBT EXISTS AS TO A TRIABLE ISSUE OF FACT: AND WHERE THE MOVING PARTY HAS NOT SUSTAINED THE BURDEN OF SHOWING THERE ARE NO ISSUES OF FACT REQUIRING A TRIAL.

In a motion for summary judgment the burden is most heavily upon the moving party to establish that there are no genuine triable issues of fact and that the moving party is entitled to judgment as a matter of law.

The rule was stated with great clarity and succinctness in Crystal City v. Del Monte,C.A.Tex.,1972, 463 Fed.2 976, cert.denied 93 S.Ct.464,409 U.S. 1023, where Ainsworth, C.J. held:

"We have held that summary judgment is proper only when the truth is clear- where the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. Cole v. Chevron Chemical Co. 427 Fed.2,390(5Cir.1970); Sinderman v. Pery, 5 Cir.1970, 430 Fed.2,939,943 * * *"

> * * * * The granting of a motion for summary judgment is the exception rather than the rule, Lovable Co.v. Honeywell,Inc., 5 Cir.1970,431 Fed.2,668,670, and the exception may be utilized only where there is no triable issue, that is where both of the requisites of Fed.R. Civ.P.56(c) have been met- where there remains no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law".(italics added)

Summary judgment is only appropriate where there is no genuine bona fide material issue of fact.(Committee for Nuclear Responsibility v. Seaborg,1971, 463 Fed.2,783; Lamb v. United Security Life Ins.Co.,D.C.Iowa,1973,59.F.R.D.44; Crane v. Aeroquip, D.C.Ill.1973,356 Fed.Supp.735.)

The purpose of summary judgment is not to cut off litigants from the right to a jury trial if they really have issues to try. (National Life Ins. Co.v.Silverman,1971, 454 Fed.2,899; Dawn v,Sterling Drug Co. D.C.Cal.1970,319 Fed. Supp.358; Curtis Publishing Co.v.Church,D.C.Pa.1973,58 F.R.D.594.)

Where there is the slightest scintilla of merit summary judgment should be denied, as Williams,D.J. clearly and succinctly stated in Dawn v. Sterling Drug, supra:

> " * * * such a drastic procedure should be used sparingly so that no plaintiff having a scintilla of merit to his cause should be denied his day in court. Vogelstein v. National Screen Serice, 204 Fed. Supp. E.D.Pa.1962." (italics added)

Summary judgment is an extreme remedy not to be entered unless movant establishes his right with such clarity as to leave no room for controversy under any discernable circumstances. (Ozark Milling v. Allied Mills,C.A.Ark.1973, 480 Fed.2.1014; Weiss v. Kay, 1972 470 Fed.2.1259,1520 U.S.App. D.C.350; Charmoil v. Texora, D.C.Minn.1973,59 F.R.D.22.) It should

be granted only with great caution only where it clearly appears there are no genuine issues as to material facts.(Scott v. Dollahite,D.C.Miss.1972,54 F.R.D.435; Hood v. McConemy,D.C.Del.1971, 73 F.R.D.435.) It must appear most clearly that there is no substantial evidence on the tendered issue.(Dawn v. Sterling Drug, supra)

Summary judgment is not a substitute for a trial of disputed fact issues and bona fide factual disputes may not be disposed of by affidavits and the rule cannot be used as a substitute for trial.(Charmoil v. Texora,supra; Hanley v. Chrysler Motors, C.A.N.M.1970,433 Fed.2.708). The purpose of summary judgment is not to explore all factual ramifications but to determine if suchexploration is necessary. (Briggs v. Kerrigan,C.A.Mass.1970,431 Fed.2,967; Artman v. International Harvester, D.C.Pa.1972,355 Fed.Supp.476, supp.482.)

If the slightest doubt exists as to a triable genuine issue of fact it necessitates a denial of summary judgment.(Bolls v.Union Co. D.C.Cal.1972,57 F.R.D.46)

The Court must give the opposing party the benefit of all favorable inferences that may reasonably drawn from the evidence. (1st National Bank v.Maryland Casualty Co. D.C.W.Va.1973,354 Fed. Supp.189); and must construe all matters outside the pleadings in the light most favorable to the opposing party.(Central Nat.Ins. Co. v.Royal Indemnity Co.337 Fed.Supp.319.)

In McCaffrey v. Cunard,supra, summary judgment was denied, the Court holding:

" (3) Where the conditions are not in the main body of the contract where the passenger is not led to expect special conditions as by taking advantage of a bargain rate for transportation or by an unambiguous warning on the face of the ticket, the question of the sufficiency of the notice of the conditions is one left for the trier of the facts. * * * * This has been true even in some cases where the conditions were on the face of the ticket. See Williamson v. North of Scotland Navegation Co.,1916,S.C.554,562, where the verdict for plaintiff was affirmed because of small size of type, and Hood v. Anchor Line (Ltd.)1918, where the verdict for defendant was affirmed but the issue recognized as one of fact.

* * * * * * * * * * * * *

(5) Upon the facts of the present case, the issue must be left for the jury. (italics added).

Based upon the foregoing authorities it can raedilly be seen that there do exist undisputable genuine triable issues of fact which should not be decided by trial by affidavit.

Does the notice or legend contained on the face of the'McQuillan'ticket constitute a sufficient warning to the unwary passenger ? This Circuit and the Appellate Term, First Dept. have held that it does not in "Silvestri" and "Owens",supra.

Has "Italia" done all that it reasonably could do to warn the passenger of incorporation by reference of the terms and conditions ? If this is a question of reasonableness it certainly is an issue for the trier of facts to decide upon a full presentation of evidence.

As the Courts have repeatedly held that the face of the ticket constitutes the contract of transportation the issue of effective incorporation by reference of a micro-

scopic notice therein is an issue for trial determination.

The issue of estoppel is one for determination by the jury and this issue will be further developed infra upon the facts that the carrier picked up the passenger's ticket upon embarkation, thus keeping him in ignorance of all its terms and thereafter deliberately refrained from warning him and his attorney of the existence of a time limitation clause that it intended to rely upon.

The foregoing constitute bona fide factual disputes of substance that have much more than a mere scintilla of merit which must be viewed in the most favorable light for the opposing party, giving him the benefit of all favorable inferences that may reasonably drawn from the evidence.

This Circuit has applied the foregoing tests in Colby v.Klune,178 Fed.2,872 (2CCA 1949) holding;

> " We have in this case one more regrettable instance of an effort to save time by an improper reversion to 'trial by affidavit', improper becasue there is involved an issue of fact, turning on credibility. * * * When, then, as here, the ascertainment(as near as may be) of the facts of a case turns on credibility, a triable issue of fact exists, and the granting of a summary judgment is error."

The foregoing principles govern equally strongly in New York where if there is any doubt as to the existence of clear, well defined and genuine issues or even if their existence is arguable the motion must be denied. Sillman v.20th Century Fox,3 N.Y.2,395,404; DiMenna & Sons v.City of New York,301 N.Y.118;

POINT III.

DEFENDANT IS ESTOPPED BY ITS CONDUCT FROM CLAIMING THE PROTECTION OF ITS PURPORTED TIME LIMITATION CLAUSE.

McQuillan's ticket was picked up by "Italia" when he boarded the vessel and never returned to him, leaving him in complete ignorance of its purported terms and conditions,(App.pp.17,18.)

The Courts have repeatedly roundly condemned this practice and relieved passengers of the burdens of ticket provisions of which they have been left in complete ignorance through no fault of their own. In Bellochio v. Italia Flotte,etc. 84 Fed.2, 975,976, it was held:

> " * * *Such limitations are lawful * * * except for the practice of taking up the ticket early in the trip and leaving the passenger in ignorance of the limitation at the only time it becomes important. On its face such a practice seems so unfair as to make doubtful the validity of the provision itself; *"

In Baer v. North German Lloyd S.S. Co. supra, the carrier picked up the ticket abord ship and the Court reversed for the passenger.

In The Kungsholm, supra, the ticket was picked on the voyage and again the Court held for the passenger.

In McCaffrey v. Cunard S.S. Co., supra, after citing two leading English cases in point where tickets had been surrendered (p.475) the Court commented upon the effect of correspondence timely had between the parties

holding:

> "The failure to leave the passenger with her copy of the alleged contract is all the more significant here * * * * * *. After her accident had in fact occurred neither shenor her lawyer had a copy of the ticket to peruse.
>
> There is also the question of the effect of the defendant's correspondence with the plaintiff after her accident. It was ambiguous at best and a jury may find that it negated any previous efforts by defendant to give plaintiff notice of the condition in question. * * * *, defendant deliberately avoided giving information of the time within which action was to be brought.
>
> * * * * * * but after prompt notice of a claim is made and there is no need for hasty disposition of the matter it might well be found by a jury that under these circumstances reliance on the previous notice of the condition was neither reasonable nor sufficient and that defendant if it intended to rely upon the conditions on the back of the contract, was at least required to disclose again to the plaintiff the terms of the condition on the back of her ticket, which she had already surrendered. " (italics added.)

A voluminous correspondence had transpired between "Italia", McQuillan and McQuillan's Counsel. (Rec/App. Doc.No.No.13, Ex.D,J,K-1,K-2,L,M-1,M-2,N) (App.pp.13, 14.) Nowheres does there appear any notice by "Italia" of an intended reliance upon a time limitation clause, although "Italia" was careful to insert passages such as : "without prejudice to any of our rights under the Passage Ticket" (App.p.13) and" must not be construed as an admission of liability in the premises" (Rec/App.Doc.13,Ex.K-2,M-2. App. p.13)

Reliance upon "Italia"'s correspondence is evidenced by the following passage from their let-

ter me (Rec/App.Doc.13, Ex.M-1) in which they state:

> " In reply to your letter of May 18, 1973, may we suggest that you remit to us in due course the finalized bills when in the opinion of the treating physician your client will have finished undergoing treatment."

That "Italia" intended to lull counsel into a state of reliance upon further negotiations is evidenced by a further statement in the same letter saying:

> "We reserve our right to have your client examined by a physician of our trust at a later date and thank you for your kind suggestion."

Equity must demand that tactics of this nature should not be countenanced by the Courts to the prejudice of unsuspecting litigants negotiating in good faith with the carrier.

The trend in recent years both in legislation and the Courts has been to make it a vital part of public policy to afford consumer protection to the unwary by numerous "truth-in-lending","full disclosure","purchaser revocation options" and other legislation designed to protect those who do not stand upon the same equal footing with the drafters of fine print contracts, high pressure salesmen and other more skillful dealers.

When viewed in this light it is clear that "Italia" does not come in"with clean hands" and should be estopped from taking advantage of its own unfair tactics.

POINT IV.

THE PASSAGE CONTRACT WAS MADE FINAL AND COMPLETE WHEN McQUILLAN ACCEPTED "ITALIA"S ADVERTISED OFFER OF CRUISE PASSAGE AND MADE HIS FULL PAYMENT OF FARE.

"Italia"s authorized agent "Liberty advertised by newspaper the projected Caribbean cruise. McQuillan accepted this offer and made his contract firm and final when he paid his full fare. Nothing was contained in the advertisement that the offer of passage was conditioned upon any conditions contained in the passage ticket. (App.p.17).

McQuillan has stated that when he made his final payment he was not shown or given the passage tickets, nor was anything said to him about any terms and conditions contained in any ticket. (App. p.18). The tickets in fact were not delivered to McQuillan until shortly before sailing date. (App.p.21). Nothing can be inserted in an after-delivered ticket which was not in the original contract and meeting of the minds which was final upon payment of fare. All that remained to be executed was for "Italia" to furnish safe passage in a properly equipped and manned seaworthy vessel with a competent Master and crew and make the advertised ports of call.

This was McQuillan's contract with "Italia" and could not be unilaterally changed by "Italia" without his consent and without consideration. The "Offer and Acceptance" concept of contract was made final on January 12th, 1973, and the rights and obligations of both parties stem from that date and that transaction.

The burden is upon "Italia" to conclusively establish that it communicated to McQuillan with that degree of reasonableness and awareness sufficient to give him knowledge and notice of any purported time limitation clause contained in the contract of passage. This it has completely failed to do. Nothing contained in their moving papers reveals any statement that McQuillan was so informed. Upon this triable issue of fact alone summary judgment should be denied.

POINT V.

THE ORDER AND JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED AND THIS CASE SENT DOWN FOR TRIAL BY JURY.

In summation we maintain that the ticket face contained the essential terms of the contract of passage. Any notices or legends incorporating by reference terms and conditions contained elsewhere in the passage booklet must be printed with that degree of awareness and readability to constitute all that the carrier could reasonably do to inform McQuillan of their existence. This "Italia" has failed to do by resorting to the use of a ticket face already rejected in the Second Circuit and the Appellate Term, 1st Dept. As a matter of law it can be held that this ticket face has been twice litigated and found wanting. The terms and conditions of this purported passage contract were not binding on McQuillan.

"Italia" by its dilatory tactics in corresponding with McQuillan and his counsel cannot be allowed to lull them into a false sense of security and thereafter spring a 'surprise' defense of a time limitation clause, particularly where "Italia" has deprived McQuillan of the opportunity to be made aware of the existence of such a clause by picking up his ticket upon embarkation. "Italia" should be estopped from asserting time limitation as a defense.

"Italia" has completely failed to sustain its burden of establishing that there are no genuine issues of facts to be tried. From all the foregoing andgiving McQuillan the benefit of every reasonable inference that can be drawn in his favor it is evident that the Court below erred in granting summary judgment.

McQuillan is entitled to his day in Court with a trial by jury, the ultimate determiner of the facts.

Respectfully submitted,

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